Filed 6/24/19 Sarsenstone Corp. v. Griffith CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

SARSENSTONE CORPORATION, Plaintiff and Appellant, v. MICHAEL W. GRIFFITH et al., Defendants and Respondents.	G055106 (Super. Ct. No. 30-2009-00318259) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Gail Andrea Andler, Judge. Affirmed.

Law Offices of Dennis Hartmann, Dennis Hartmann; Snell & Wilmer, Richard A. Derevan and Todd E. Lundell for Plaintiff and Appellant.

Blank Rome, Andrew R. Fletcher, Richard Weibley and Jeffrey Rosenfeld for Defendants and Respondents Michael Griffith and FCI Lender Services, Inc.

* * *

Sarsenstone Corporation appeals from a judgment following a bench trial in favor of respondents Michael W. Griffith and FCI Lender Services, Inc. (FCI).[1] The trial court concluded that Sarsenstone could not prove its claims against respondents for breach of fiduciary duty arising from (1) the solicitation of investors for investment trusts formed from pooling nonperforming consumer loans (promoter-based liability) or (2) the trustee relationship with the investors created by written Declarations of Trust (trustee-based liability). Sarsenstone contends the trial court erred as a matter of law in concluding that (1) Sarsenstone could not assert a promoter-based claim at trial because it failed to plead the claim and (2) promoter-based liability does not apply to the investment trusts at issue. We conclude Sarsenstone failed to plead a promoter-based claim and in any event, the doctrine of promoter liability does not apply to express trusts. Sarsenstone also contends the trial court erred in concluding that no express trust was formed, and even if an express trust had been formed, respondents were not liable for any breach of fiduciary duty. We conclude that some of the investment trusts were not express trusts under the Probate Code, and on the remaining investment trusts, we conclude that respondents were not liable for any trustee-based breach of fiduciary duty because respondents were not trustees, did not assume any duties of a trustee, and were not liable for any breach under a civil conspiracy theory. Accordingly, we affirm the judgment.

---

[1] The parties are before us for a second time. Previously, we affirmed in part and reversed in part the trial court's order sustaining respondents' demurrer to Sarsenstone's Second Amended Complaint (SAC). We also affirmed in part and reversed in part the order sustaining the demurrer to the SAC filed by John Jewelinski, Vicki Jewelinski and Tri-Hook Investments, Inc. (Jewelinski defendants) (See *Sarsenstone v. Jewelinski* (June 28, 2012, G044543) [nonpub. opn.].) The remaining claims against the Jewelinski defendants were dismissed by mutual agreement, and only respondents remained in the case.

I

FACTUAL AND PROCEDURAL BACKGROUND

A. *Complaint*

On October 28, 2014, Sarsenstone filed a Third Amended Complaint (TAC) alleging causes of action against respondents for (1) breach of fiduciary duty, (2) constructive trust, (3) money had and received, and (4) accounting. According to the TAC, in July 2002, Griffith and Gregory Fernandez formed Old Canal as a joint venture to solicit investors to purchase at a discount portfolios of defaulted secured loans. Old Canal pooled the loans into investment trusts and sold fractional interests in those trusts to investors. Old Canal then sought to collect on the defaulted loans and distribute any proceeds it recovered to the investors.

The TAC further alleged that shortly after creating Old Canal, Griffith and Fernandez conspired to defraud investors and divert investment trusts assets to themselves. One method they allegedly used was to "mark up" the acquisition price of loan pools and pocket the mark up. For example, Griffith and Fernandez would purchase a loan pool at a reduced price, but inform the investors that it had been purchased at a higher price, and split the difference. Griffith and Fernandez also issued to themselves or to companies they owned, such as FCI, interests – "phantom shares" – in some of the investment trusts without paying for those interests. Finally, Griffith and Fernandez represented to the investors that the sole compensation for administering the loan pools would be a 15 percent fee of gross collections, which would increase to 50 percent once total collections had been sufficient to return all of the investors' original investment to them.

The TAC further alleged that as part of their conspiracy, the coconspirators "concealed their activities from investors in the Trusts and all other beneficiaries of their fiduciary duties" and "used their domination of Old Canal to ensure that the corporate entity did nothing to assert its rights against the co-conspirators." The investors in the

Trusts allegedly first became aware that Old Canal was breaching its duties to them in April 2007, when certain investors initiated involuntary bankruptcy proceedings against Old Canal.

Finally, Sarsenstone stated it brought the action in two capacities: (1) as successor trustee of certain trusts organized by Old Canal and for which Old Canal was originally the trustee, and (2) as trustee of the "Master Pool" of trusts formed by the bankruptcy court order as successor to certain individual trusts marketed and sold by Old Canal and respondents.

B. *Judgment Following Trial*

Following a 16-day bench trial, the trial court found that Sarsenstone failed to prove its claims against respondents. In its Statement of Decision, the court made several findings of fact and conclusions of law. It found that Old Canal was formed on July 2, 2002, and the original shareholders in Old Canal were Griffith, who owned 40 percent, and Nest Feather Investments, Inc., which owned 60 percent. Fernandez owned and controlled Nest Feather. The court found that between December 2003 and September 2004, Old Canal purchased delinquent loans from financial institutions with funds that Griffith and others provided to it. After purchasing the loans, Old Canal organized the loans into pools and marketed to investors fractional interests in these loan pools (the "Old Canal Loan Pools"). After the investors provided Old Canal with investment funds, Old Canal provided the investor with a Declaration of Trust and a Letter of Understanding. Each Declaration of Trust and Letter of Understanding was signed by Old Canal as the "Trustee" and by the investor as the "Beneficiary." Until April 2004, Old Canal contracted with FCI to service the loans. After April 2004, Old Canal took over responsibility for servicing the loans.

The trial court determined that Sarsenstone failed to present credible evidence to establish that Griffith or FCI assumed or were responsible for Old Canal's alleged fiduciary duties as the trustee for the Old Canal Loan Pools. According to the

court, Sarsenstone's case relied heavily on the testimony of Fernandez to prove the relationship between Old Canal and Griffith or FCI, but the court found Fernandez lacked credibility, explaining, "[r]arely has this Court seen a witness so lacking in credibility." After acknowledging that Sarsenstone also presented other evidence aside from Fernandez's testimony, the court concluded "the balance of the evidence presented by Plaintiff was insufficient to meet Plaintiff's burden of demonstrating the level of knowing participation necessary in any wrongful acts or omissions, to the extent there were any, of Fernandez, to impose liability on [respondents]." Specifically, the court determined that Sarsenstone did not present sufficient evidence to establish (1) that Griffith or FCI agreed with Fernandez to conceal from investors the profits Old Canal earned from selling fractional interests in the loan pools, or (2) Griffith and FCI knew of any wrongdoing or knowingly participated in any wrongdoing related to soliciting investments in the Old Canal Loan Pools.

The trial court concluded that Sarsenstone had standing as successor trustee and Master Pool trustee to assert its claims. However, it concluded Sarsenstone failed to present sufficient evidence to establish either Griffith or FCI owed any trustee-based fiduciary duty to the investors. Specifically, the court concluded the Declarations of Trust and Letters of Understanding did not form an express trust, but instead formed a contractual relationship or a "nominee trust," which is excluded from the Probate Code's definition of trusts. It further concluded that FCI's agreement to service loans for Old Canal did not give rise to any fiduciary relationship between FCI and the investors.

The court concluded in the alternative that even if an express trust existed, Old Canal did not have a fiduciary duty to the trust until it accepted the trust by executing the trust instrument or exercising its powers under the trust instrument. The court found that Old Canal did not create the Declaration of Trust or accept the role of trustee until after selling the fractional interest in the loan pools to investors and after distributing profits from these sales to its shareholders. Moreover, the court found that Old Canal

alone was the trustee under the Declaration of Trust, and Sarsenstone failed to present evidence sufficient to impose trustee duties on either Griffith or FCI. Specifically, the court found that Old Canal did not delegate its role as trustee to Griffith or FCI; nor did FCI or Griffith take any action that could be construed as accepting the role of trustee.

The trial court concluded Griffith and FCI could not be liable for the acts of Old Canal and Fernandez based on a theory of conspiracy for two reasons. First, nonfiduciaries cannot be liable for breach of fiduciary duty on a conspiracy theory because they are legally incapable of committing the underlying tort, and Sarsenstone failed to present sufficient evidence to establish that Griffith or FCI owed any fiduciary duty. (See *Applied Equipment Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 Cal.4th 503, 511 ["tort liability arising from conspiracy presupposes that the coconspirator is legally capable of committing the tort, i.e., that he or she owes a duty to plaintiff recognized by law and is potentially subject to liability for breach of that duty"].) Second, Sarsenstone failed to present evidence establishing the existence of a conspiracy between Griffith or FCI and Fernandez.

The trial court also rejected Sarsenstone's contention that Griffith and FCI were liable under the doctrine of promoter liability. Because Sarsenstone never asserted this theory in the TAC, the court concluded it could not assert this theory for the first time at trial because it failed to seek leave to amend its pleading. The court also rejected the theory on the ground, among others, that the doctrine of promoter liability applied to express trusts. The court also concluded that even if Old Canal and Fernandez were liable under the doctrine of promoter liability, Sarsenstone failed to prove that Griffith or FCI also would be liable.

Finally, the trial court concluded that Sarsenstone failed to prove its damages and its claims were time-barred by the applicable statute of limitations.

II

DISCUSSION

A. *Standards of Review*

"The most fundamental rule of appellate review is that a judgment is presumed correct, all intendments and presumptions are indulged in its favor, and ambiguities are resolved in favor of affirmance." (*City of Santa Maria v. Adam* (2012) 211 Cal.App.4th 266, 286.) An appellant has the burden of overcoming the presumption of correctness and must provide an adequate appellate record and present argument and legal authority on each point raised. It is not our role to construct arguments which would undermine the judgment and defeat the presumption. (*Kriegler v. Eichler Homes, Inc.* (1969) 269 Cal.App.2d 224, 226-227.)

In reviewing a judgment based upon a statement of decision following a bench trial, we review questions of law de novo. (*Thompson v. Asimos* (2016) 6 Cal.App.5th 970, 981.) For example, "[q]uestions of statutory interpretation, and the applicability of a statutory standard to undisputed facts, present questions of law, which we review de novo. [Citation.]" (*Jenkins v. County of Riverside* (2006) 138 Cal.App.4th 593, 604.) In reviewing the trial court's findings of fact, we generally apply a substantial evidence standard of review. (*Thompson v. Asimos*, *supra*, 6 Cal.App.5th at p. 981.) However, where, as here, "'the trier of fact has expressly or implicitly concluded that the party with the burden of proof did not carry the burden and that party appeals,'" "'the question for a reviewing court becomes whether the evidence compels a finding in favor of the appellant as a matter of law. [Citations.] Specifically, the question becomes whether the appellant's evidence was (1) "uncontradicted and unimpeached" and (2) "of such a character and weight as to leave no room for a judicial determination that it was insufficient to support a finding."'" (*Sonic Manufacturing Technologies, Inc. v. AAE Systems, Inc*. (2011) 196 Cal.App.4th 456, 465-466 (*Sonic*).)

B. Breach of Fiduciary Duty Based on Promoter Liability

Sarsenstone contends the trial court erred in ruling that Griffith and FCI were not liable for breach of fiduciary duty under the doctrine of promoter liability. As the California Supreme Court has explained: "'Promoters of a corporation occupy a fiduciary relation to it and have no right to derive any advantage over other stockholders, without a full and fair disclosure of the transaction; and any secret profits which they acquire through promoting the corporation must be refunded, and may be recovered in equity by the corporation or its legal representative, and in many cases at law. Persons who organize a corporation for the purpose of working certain property are bound to disclose to persons who may be by them induced to join them in the company, what the vendors of the property actually receive for it; and if, by deceiving the members of the company as to the actual price paid for the property, or if, by collusion with the vendors they are permitted to retain for themselves a portion of the purchase money, they must account to the company for the same in equity; or the company may maintain an action *in assumpsit* against them for the moneys so secretly reserved to themselves, as so much money had and received to its use. In like manner, persons who purchase property and then organize a company to purchase it from them, stand in a fiduciary position toward such company, and must faithfully state to the company all material facts relating to the property, which would influence the company in deciding on the desirability of purchasing it.'" (*California-Calaveras Min. Co. v. Walls* (1915) 170 Cal. 285, 294.)

The trial court concluded Sarsenstone could not assert a claim for breach of fiduciary duty based on promoter liability because it failed to plead promoter liability in the TAC, and failed to seek leave to amend the TAC to include promoter liability. (See *People v. Toomey* (1984) 157 Cal.App.3d 1, 11 ["party must recover on the cause of action alleged in the complaint and not on a separate and distinct cause of action disclosed by the evidence"].) The TAC did not use the term "promoter" or referenced

any case involving promoter liability.[2] Rather, all allegations involved trustee-based liability for failure to disclose material facts or making secret profits from dealing in trust property. For example, in paragraph 19 of the TAC, it was alleged that "[*a*]s *Trustee* of the Griffith Fernandez trusts, Old Canal, as well as Fernandez, Griffith and FCI as the corporate agents, officers and instrumentalities who personally carried out the duties of Trustee, were fiduciaries for the Trusts and the investors in the Trusts. As such, these Defendants had a duty (a) to refrain from self-dealing for undisclosed profits in the Trusts and their assets; (b) at all times to disclose fully and clearly any and all information that might be material to the beneficiaries of their fiduciary duties; and (c) to account completely and truthfully for any and all their actions and inactions as Trustee. The *marketing* and administration of the Griffith Fernandez Trusts as described above pursuant to these Defendants' conspiracy *was a gross breach of fiduciary duty* to the Griffith-Fernandez Trusts and their investors." (Italics added.) In the breach of fiduciary duty cause of action, the TAC asserted that "[f]or the reasons stated above, Griffith and FCI owed the investors in the Griffith-Fernandez Trusts fiduciary duties." A trustee-beneficiary or trustee-trust relationship is legally distinct from a promoter-stockholder or promoter-corporation relationship. For example, "the fiduciary relation of a promoter of a corporation to the corporation to be organized may exist long before its actual organization." (*California-Calaveras Min. Co. v. Walls*, *supra*, 170 Cal. at p. 300.) However, a trustee owes no fiduciary duty to the trust until the trust is created. (See *Reagh v. Kelley* (1970) 10 Cal.App.3d 1082, 1089 ["In order to constitute a valid trust there must be a competent trustor, an intention on the part of the trustor to create a trust, a trustee, an estate conveyed to the trustee, an acceptance of the trust by the trustee, a

---

[2] The TAC does argue that with respect to the Jewelinski defendants, the corporate veil should be pierced because "adherence to the fiction of the corporate Defendant's separate existence would sanction a fraud or promote injustice." The TAC also alleged that Jack Jewelinski's duties were described in "one item in Old Canal's promotional literature."

beneficiary, a legal purpose, and legal terms."]; Prob. Code, § 15601, subd. (c) ["A person named as trustee who rejects the trust or a modification of the trust is not liable with respect to the rejected trust or modification."]; § 16000 ["On acceptance of the trust, the trustee has a duty to administer the trust …."].) Because the TAC only alleged a trustee-based claims and Sarsenstone did not seek leave to amend the TAC, the material variance is fatal to any promoter-based claim. (See *Bailey v. Brown* (1906) 4 Cal.App. 515, 517 ["That the plaintiff must recover, if at all, upon the cause of action alleged, and not upon some other which may appear from the proofs. [Citations.] Unless plaintiff obtained leave to so amend his complaint as to conform to the proofs, the defendant may have his nonsuit . . . ."]; accord, *Lewis v. South San Francisco Yellow Cab Co*. (1949) 93 Cal.App.2d 849, 853.)

Even had Sarsenstone not forfeited its promoter-based claim, the doctrine of promoter liability applies only to promoters of a corporation, limited liability company, or similar corporate entity, and not to express trusts. Sarsenstone concedes no case has applied promoter liability to express trusts, but argues this court should extend the doctrine of promoter liability to express trusts based on the doctrine's rationale. According to Sarsenstone, that rationale is the well-settled principle that "associates in a common enterprise, under whatever guise, have a duty to each other to make full disclosure of any preference or profit not common to all of the associates." (*Munson v. Fishburn* (1920) 183 Cal. 206, 211 (*Munson*); accord, *Eisenbaum v. Western Energy Resources, Inc.* (1990) 218 Cal.App.3d 314, 322 (*Eisenbaum*) ["A promoter or insider, or a seller of a limited partnership interest, owes a fiduciary duty to the prospective purchaser of such an interest."].)

We reject Sarsenstone's contention because the stated rationale does not support extending the doctrine of promoter liability from corporations to express trusts. First, the parties to an express trust generally are not "associates in a common enterprise" because express trusts formed to conduct business generally are excluded from the

definition of trusts under the Probate Code. For example, Probate Code section 82 excludes from its definition of a trust, "[b]usiness trusts" (*id.*, subd. (b)(6)), "[i]nvestment trusts" (*id.*, subd. (b)(7)), "[l]iquidation trusts" (*id.*, subd. (b)(12), and "[t]rusts for the primary purpose of paying debts, dividends, interest, salaries, wages, profits, pensions, or employee benefits of any kind" (*id.*, subd. (b)(13)). Second, an express trust is not similar to a corporation. In contrast to a corporation, which is a distinct legal entity and often treated as a person, an express trust is not a person but rather a fiduciary relationship with respect to property. (*Ziegler v. Nickel* (1998) 64 Cal.App.4th 545, 548.) Finally, we note the doctrine of promoter liability and express trusts have existed for well over a century. (See, e.g., *Burbank v. Dennis* (1894) 101 Cal. 90, 97 [discussing action against promoter of a corporation]; *In re Estate of Walkerly* (1895) 108 Cal. 627, 648 [discussing express trust].) During that time, no court has extended the doctrine of promoter liability to express trusts. We also decline to do so.[3]

C. Breach of Fiduciary Duty Based on Trustee Relationship

The trial court concluded that Griffith and FCI were not liable for breach of fiduciary duty arising from a trustee relationship because the investment trusts were not express trusts under the Probate Code. Sarsenstone attacks the court's conclusion on several grounds.

Sarsenstone first contends the trial court's conclusion that the investment trusts are not express trusts is contrary to and precluded by the orders of the federal bankruptcy and district courts granting Sarsenstone standing to sue as successor trustee. (See *Nathanson v. Hecker* (2002) 99 Cal.App.4th 1158, 1163 ["California gives full faith and credit to a final order or judgment of a federal court"].) However, standing goes to

---

[3] Because we reject Sarsenstone's argument that respondents are liable for promoter-based breach of fiduciary duty arising from the promotion of express trusts, we need not address the other grounds the trial court relied on to find respondents not liable as promoters.

the existence of a cause of action, not to its merits. (See *Apartment Assn. of Los Angeles County, Inc. v. City of Los Angeles* (2006) 136 Cal.App.4th 119, 128 ["A litigant's standing to sue is a threshold issue to be resolved before the matter can be reached on its merits."].) The mere fact that Sarsenstone had standing to bring trustee-based breach of fiduciary duty claims did not preclude the trial court from concluding that no express trust was formed. The district court itself held the formation of the express trust was a matter for the trial court to determine. It stated: "The Court expresses no opinion on the formation of the trusts as it was neither an issue before the Bankruptcy Court nor briefed . . . . Furthermore, although standing issues may be intertwined with the merits of a case, the substance of [respondents'] argument appears to be something for the Superior Court—specifically, that Sarsenstone's claim for breach of fiduciary duty fails to the extent it seeks redress for alleged misconduct that occurred before the actual formation of the trusts." Thus, the orders granting Sarsenstone standing did not preclude the trial court from finding the parties did not form an express trust.

Next, Sarsenstone contends Griffith is estopped from arguing that no express trust was formed because in a prior lawsuit he was a named plaintiff on an unverified complaint that alleged Old Canal breached its fiduciary duty as trustee not to self-deal in the assets of the trusts. Griffith, however, explained at trial that although he helped fund the litigation, he never spoke to plaintiffs' attorney, and never received a copy of the complaint before it was filed. The trial court was entitled to credit Griffith's testimony and based on that testimony it could decline to bind Griffith to the complaint's allegations. (See *Fibreboard Paper Products Corp. v. East Bay Union of Machinists* (1964) 227 Cal.App.2d 675, 707 ["allegations of fact in a pleading are presumed to be those of the party, and are therefore accepted as admissions, subject to the right of the party to controvert them by showing that they were not authorized by him or were made inadvertently or under a mistake of fact."].)

Finally, Sarsenstone contends the trial court erred in concluding the investment trusts were not express trusts under the Probate Code, but nominee trusts. The trial court's determination the Declarations of Trust created nominee trusts is a legal conclusion based on its interpretation of contractual language and the Probate Code. Because the interpretation of statutes and contracts is strictly an issue of law, we are not bound by the trial court's interpretation, and must instead independently review the court's determination. (*Century Transit Systems, Inc. v. American Empire Surplus Lines Ins. Co.* (1996) 42 Cal.App.4th 121, 125.)

No California case has defined a nominee trust. The Probate Code, however, excludes from its definition of a "trust" "[a]ny arrangement under which a person is nominee or escrowee for another." (Prob. Code, § 82, subd. (b)(14).) Under California law, a "nominee" is an agent for another. (*See, e.g., Gomes v. Countrywide Home Loans, Inc*. (2011) 192 Cal.App.4th 1149, 1156, fn. 7 ["under California law MERS may initiate a foreclosure as the nominee, or agent, of the noteholder."].) Similarly, other jurisdictions have defined a nominee trust as an agency relationship between the nominee trustee and the beneficiary. (See, e.g., *Zoppo v. Zoppo* (D. Mass. 2006) 453 F.Supp.2d 232, 235 [under Massachusetts law, "nominee trusts are defined by total control of the present beneficiary, with the trustee simply an agent obligated to hold the property"].) However, the mere fact that beneficiaries of a putative trust have some control over trust property does not convert a trust relationship into an agency relationship. (See *Dessar v. Bank of America National Trust & Savings Ass'n* (9th Cir. 1965) 353 F.2d 468, 473 ["While extensive powers are retained by the trustor, they are not so broad as to make the relationship one of mere agency. For example, the trustee is not fully relieved of its very broad duties in relation to investment . . . . It must follow the trustor's written directions if given, and is protected by them. But we find nothing in the agreement relieving it of its duties when directions are not given."]; *Karras v. Teledyne Industries, Inc*. (S.D. Cal. 2002) 191 F.Supp.2d 1162, 1171 [trusts are express trusts, not

nominee trusts, because although grantors had "power to direct only some of the Trustee's actions. The Trustee retains significant authority to hold, invest and manage the Trust assets."].)

According to Sarsenstone, there were two versions of the Declaration of Trust. The first version, applicable to the first three loan pools, provided that FCI or one of Griffith's other companies was the trustee (hereinafter "Griffith/FCI Declaration of Trust"). The second version, applicable to the remaining loan pools, provided that Old Canal was the trustee (hereinafter "Old Canal Declaration of Trust"). Both versions share the following provisions. The preamble declares that the trust is a "directional holding trust." Generally, under the terms of a directional holding trust, the beneficiary retains "absolute control over trust property." (*Walgren v. Dolan* (1990) 226 Cal.App.3d 572, 574, fn. 1 & 576.) Section One of the Declaration of Trust provides that "the interest of any beneficiary hereunder shall consist solely of a power of direction to deal with the title to said Pool and to manage and control said Pool." The main difference between the two versions is found in Section Four of the Griffith/FCI Declaration of Trust, which provides that the beneficiary "shall have management of said Pool and control of the selling, renting and handling therefor, and said trustee shall have no duty in respect to such management or control, . . . except in written direction as hereunder provided." In contrast, the analogous section in the Old Canal Declaration of Trust provides that the "Beneficiaries acknowledge and agree that the Trustee shall manage and control the Pool, and provide for the servicing and collection of the obligations contained in the Pool." In addition, under the Old Canal Declaration of Trust, the trustee, "in the best interests of the Trust, and in its sole discretion, may elect to not collect or receive rentals or manage, operate, improve or repair any of the assets of the Pool at any time."

The Griffith/FCI Declaration of Trust resulted in the creation of an arrangement under which the putative trustee is a nominee. (Prob. Code, § 82, subd. (b)(14).) The document vests absolute power over the trust property in the beneficiary.

Moreover, the beneficiary did not expressly delegate any power to manage or control the trust property to the trustee. Accordingly, the resulting investment trusts are not express trusts under the Probate Code.

We reach a different conclusion with respect to the investment trusts formed by the Old Canal Declaration of Trust. Although the document initially vested absolute power over trust property with the beneficiaries, the beneficiaries delegated most of that power to the trustee. Specifically, the trustee was empowered to "manage and control" the trust property and was granted sole discretionary authority to "elect to not collect or receive rentals or manage, operate, improve or repair any of the assets of the Pool at any time." In light of the broad delegation of power, the trustee is not a mere nominee of the beneficiaries. Accordingly, the investment trusts formed as a result of the Old Canal Declaration of Trust are not excluded as express trusts under the Probate Code.

The trial court concluded that even if the Declarations of Trust formed express trusts under the Probate Code, Old Canal did not have a fiduciary duty to the investment trusts until the trusts were formed and it accepted the role of trustee. We agree with the trial court's legal conclusion. (See Prob. Code, § 15601, subd. (c) ["A person named as trustee who rejects the trust or a modification of the trust is not liable with respect to the rejected trust or modification."]; § 16000 ["On acceptance of the trust, the trustee has a duty to administer the trust …."]; see also *McCarthy v. Poulsen* (1985) 173 Cal.App.3d 1212, 1217 ["it is . . . the universal rule in this country that a person may not be forced to be a trustee without his consent"].) Thus, Old Canal, as well as Griffith and FCI, cannot be liable for a trustee-based breach of fiduciary duty before the formation of the investment trusts.

Sarsenstone's reliance on *Eisenbaum* and *Victor Oil Co. v. Drum* (1920) 184 Cal. 226 (*Victor Oil*), is misplaced. Those cases do not hold that a trustee owes a fiduciary duty to the trust before the formation of the trust. Indeed, *Eisenbaum* and *Victor Oil* do not involve trusts and the liability of trustees for breach of fiduciary duty,

but rather corporate entities and the liability of promoters for breach of fiduciary duty. (See *Eisenbaum*, *supra*, 218 Cal.App.3d at pp. 318 & 324 [limited partnership and insider-promoter]; *Victor Oil*, *supra*, 184 Cal. at p. 229 [corporation and promoter].)

After accepting a trust, a trustee owes fiduciary duties to the trust. The trial court, however, concluded that even if Old Canal owed fiduciary duties, Sarsenstone failed to prove that Griffith or FCI accepted the role of trustee and therefore were liable for any breach of those fiduciary duties. The Old Canal Declaration of Trust provides that Old Canal is the sole trustee. The related Letter of Understanding does not discuss who is the trustee, but names Old Canal as the "manager" of the resulting investment trust; Griffith and FCI are not referenced. In addition, the trial court found that Old Canal did not delegate its role as trustee to Griffith or FCI, and that Griffith and FCI did not take any action that could be construed as accepting the role of trustee. On appeal, Sarsenstone has not shown that any """uncontradicted and unimpeached""" evidence """of such a character and weight""" to compel us to second-guess those findings. (*Sonic*, *supra*, 196 Cal.App.4th at p. 466.)

Sarsenstone contends that Griffith's service as "chairman of the board of Old Canal and its co-CEO "imposes upon him an independent fiduciary duty. In support, it cites *Middlesex Ins. Co. v. Mann* (1981) 124 Cal.App.3d 558 (*Middlesex*), *Knoblock v. Waale-Camplan Co*. (1956) 141 Cal.App.2d 870 (*Knoblock*), and *Crenshaw v. Roy C. Seeley Co.* (1933) 129 Cal.App. 627 (*Crenshaw*). In *Crenshaw*, the court found the defendant, "president and managing head . . . of the corporate trustee," liable for breach of fiduciary duty because the defendant is "an agent of the trustee" and thus subject to "same duties and obligations" as trustee. (129 Cal.App. at p. 632.) In *Knoblock*, a case involving conversion by two directors of a company, the court found the directors were

involuntary trustees under Civil Code section 2224.[4] The court also cited *Crenshaw* for the proposition that two directors of a corporate trustee were agents of the corporate trustee and thus "charged with the same duties and obligations as had been imposed on the corporate trustee." (*Knoblock*, 141 Cal.App.2d at p. 874.) In *Middlesex*, the court noted that *Knoblock* "is generally cited for the proposition that a managing officer-director of a corporate trustee individually bears a fiduciary duty to the beneficiary of the trust and is liable to the beneficiary for conversion of the trust property to the use of the corporation of which he knew or in the exercise of his fiduciary duties should have known." (*Middlesex*, 124 Cal.App.3d at p. 572.)

As the foregoing shows, any trustee-based fiduciary duty on an agent arises from the agency relationship between the trustee and the agent. However, as noted, the trial court found that Griffith did not take any action that could be construed as accepting the role of trustee. This would include being Old Canal's agent for those acts forming the basis for Sarsenstone's trustee-based breach of fiduciary duty claim. (See *Universal Bank v. Lawyers Title Ins. Corp*. (1997) 62 Cal.App.4th 1062, 1066 [existence or extent of an agency relationship is a question of fact].) On this point, we note the court found that Griffith was not liable for breach of a fiduciary duty to disclose material facts relating to the loan pools because he was not aware of any wrongdoing and did not knowingly participate in any wrongdoing related to soliciting investment in the trusts. On appeal, Sarsenstone has not shown that any "'"'uncontradicted and unimpeached'"'" evidence "'"'of such a character and weight'"'" that would compel contrary findings. (*Sonic*, *supra*, 196 Cal.App.4th at p. 465.)

---

[4] Civil Code section 2224 provides: "One who gains a thing by fraud, accident, mistake, undue influence, the violation of a trust, or other wrongful act, is, unless he or she has some other and better right thereto, an involuntary trustee of the thing gained, for the benefit of the person who would otherwise have had it." However, the resulting constructive trust imposed is excluded as a "trust" under the Probate Code. (See Prob. Code, § 82, subd. (b)(1).)

Nor does *Munson*, *supra*, 183 Cal. 206, support the extension of a trustee's fiduciary duties to all "associates in a common enterprise." (*Id*. at p. 211 ["associates in a common enterprise, under whatever guise, have a duty to each other to make full disclosure of any preference or profit not common to all of the associates."].) *Munson* involved promoter-based breach of fiduciary duty, not trustee-based breach of fiduciary duty. We already have concluded the doctrine of promoter liability cannot apply to express trusts. Likewise, *Eisenbaum*, *supra*, 218 Cal.App.3d 314, and *Victor Oil*, *supra*, 184 Cal. 226, do not assist Sarsenstone, as they too are promoter-liability cases.[5]

Finally, Sarsenstone has not shown that Griffith and FCI are liable for any trustee-based breach of fiduciary duty as coconspirators with Fernandez. The trial court concluded that Sarsenstone failed to show the existence of a civil conspiracy involving Griffith, FCI and Fernandez. Specifically, the court found that Sarsenstone failed to present sufficient evidence to establish (1) Griffith or FCI agreed with Fernandez to conceal from investors the profits Old Canal earned from selling fractional interests in the trusts, or (2) Griffith and FCI was aware of any wrongdoing or knowingly participated in

---

[5] Sarsenstone cites *Victor Oil* for the proposition that a defendant is liable for breach of fiduciary duty if the defendant profits from the breach. However, in *Victor Oil*, *supra*, 184 Cal. 226, the California Supreme Court only held that profiting from a breach of fiduciary duty constitutes substantial evidence to support a finding that the defendant participated in the breach. There, the Supreme Court affirmed a judgment in favor of a corporation against four men who were allegedly its promoters. (*Id*. at pp. 229, 243.) The high court concluded ample evidence supported the trial court's finding that "all four defendants were participants in the fraudulent scheme to make a profit out of the organization of the plaintiff, and the sale to it of lands in excess of their real price." (*Id.* at p. 238.) In response to one defendant's argument there was no direct evidence he was actually aware of the scheme, the court held that "the circumstances of his close association with the other parties, his becoming an organizer, director, and secretary and treasurer of the company, and above all, the payment to or for him of his share of the profit and his acceptance of it, are sufficient to sustain the finding that he was a party to the scheme." (*Ibid*.) In contrast, the trial court here found that Griffith and FCI was not aware of any wrongdoing, and they did not knowingly participate in any wrongdoing related to soliciting investment in the trusts.

any wrongdoing related to soliciting investment in the trusts. Without this evidence, Sarsenstone cannot prove the existence of a civil conspiracy. (See *Kidron v. Movie Acquisition Corp.* (1995) 40 Cal.App.4th 1571, 1582 ["'[t]he basis of a civil conspiracy is the formation of a group of two or more persons who have agreed to a common plan or design to commit a tortious act.' [Citations.]"; "conspiring defendants must also have actual knowledge that a tort is planned and concur in the tortious scheme with knowledge of its unlawful purpose."]; *Davis v. Superior Court* (1959) 175 Cal.App.2d 8, 23 ["'Mere association does not make a conspiracy. There must be evidence of some participation or interest in the commission of the offense.'"].) On appeal, Sarsenstone asserts that Griffith authorized and participated in Old Canal's tortious business model, but provides no record citation to support the assertion. This is insufficient to constitute """uncontradicted and unimpeached""" evidence """of such a character and weight""" that would compel a finding that a civil conspiracy existed. (*Sonic*, *supra*, 196 Cal.App.4th at p. 465.)[6]

In sum, Sarsenstone failed to prove that respondents are liable for breach of fiduciary duty as promoters or trustees or under a civil conspiracy theory.

[6] In light of our holding, we need not reach the trial court's alternative grounds for concluding Griffith and FCI were not liable for any breach of fiduciary duty.

III

DISPOSITION

The judgment is affirmed. Respondents are entitled to their costs on appeal.

ARONSON, J.

WE CONCUR:

O'LEARY, P. J.

BEDSWORTH, J.